IN THE MATTER OF HOLLY SPRINGS NATURE CONSERVANCY & WILDLIFE SANCTUARY, INC. - LEGAL OWNER AND POWER FACTOR, LLC - LESSEE, PETITIONERS FOR SPECIAL EXCEPTION ON THE PROPERTY LOCATED AT 18627 FALLS ROAD 5TH ELECTION DISTRICT 3RD COUNCILMANIC DISTRICT	*	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY Case Nos. 19-183-X and CBA-20-004

* * * * * * * * * * * * *

OPINION

This case comes before the Board on appeal of the final decision of the Administrative Law Judge ("ALJ") in which the ALJ granted, with conditions, a Petition for Special Exception to allow a Solar Facility by Opinion and Order dated June 20, 2019. Protestants, Valleys Planning Council, Inc., North County Community Group, Kevin Webb, Maria Webb, Linda Ault, Ethan Lavin, Wayne Yelle, Allen Yelle, Mary Ruth Fowble, Glenn Fowble and Donna Fowble (collectively the "Protestants") filed an appeal.

A public hearing was held before this Board on September 19, 2019, September 24, 2019 and October 23, 2019. The Petitioners, Holly Springs Nature Conservancy & Wildlife Sanctuary, Inc. ("Holly Springs") and Power Factor, LLC ("Power Factor") (collectively referred to as the "Petitioners") were represented by Lawrence E. Schmidt, Esquire and Smith, Gildea & Schmidt, LLC. The Protestants were represented by Michael R. McCann, Esquire. A public deliberation was held on December 10, 2019.

FACTUAL BACKGROUND

In this case there are two separately deeded parcels of land at issue upon which two separate solar facilities will be constructed, namely: Parcel 144 which consists of 26.39 acres+/- of land, (Tax Acct No.: 0523015126) ("Parcel 144"); and Parcel 121 which consists of 6.12 acres+/- and

having an address of 18627 Falls Road. (Tax Acct. No.: 0504000210) ("Parcel 121"). (Prot. Ex. 13, 14, 22). (See also Amended Petition for Special Exception and Variance). Parcel 144 sits east of Falls Rd. and north/northeast of Parcel 121. Falls Road is a Baltimore County designated scenic byway. (Pet. Ex. 12; Prot. 7).

Parcel 144 has the remnants of an old barn. (Pet. Ex. 8.O, 8.S, 8.T, 8.U). Parcel 144 is split zoned RC2 and RC8. (Pet. Ex. 3A, 3B, 22A, 22B). Parcel 121 is improved with a house and is zoned RC2. (Prot. Ex. 17.1-17.11). (Pet. Ex. 3A, 3B, 22A, 22B). Both parcels are owned by Holly Springs. (Prot. Ex. 14).

The Petitioners are proposing to use 6.46 acres+/- of Parcel 144, and 2.69 acres+/- of Parcel 121, for two solar facilities as set forth on Petitioners' Site Plan (the "Site Plan"). (Pet. Ex. 3C, 3D, 22C, 22D). Together, these solar facilities will generate 1.8 Mw of AC electricity. The northern and northeastern portions of Parcel 144 (approx. 14.2 acres+/-) is wooded, and is classified as "priority" forest (Pet. Ex. 5, 16, 20, 21).

It is proposed that one of the solar facilities will be located entirely within Parcel 144. ("Solar Facility 144"). (Pet. Ex. 3C, 3D, 22C, 22D). Solar Facility 144 will be accessed via a gravel 'S' shaped driveway on the northwestern boundary along Falls Rd. The second solar facility will be located partly on both Parcel 144, and partly on Parcel 121. ("Solar Facility 144/121"). (Pet. Ex. 3C, 3D, 22C, 22D). Separately, Solar Facility 144/121 will be accessed via a 'U' shaped gravel driveway at the south-western end of Parcel 121. (Pet. Ex. 3C, 3D, 22C, 22D).

Each of the solar facilities will be enclosed with its own 7 ft. vinyl coated, chain linked fence. (Pet. Ex. 3C, 3D, 22C, 22D). Running along each of these fence lines is a 100 ft. stream buffer which was generated as a result of a tree-lined stream flowing south-westerly between the two solar facilities. (Id.) That stream flows from another stream located on the forested, northern

end of Parcel 144. Both streams are tributaries to Compass Run. (Pet. Ex. 20). In addition, designated areas of wetlands are also located between the two solar facilities in the same area as the stream. (Pet. Ex. 3A, 3B, 20, 22A, 22B).

The solar facilities will be connected by an underground electric line represented by "UGE" on the Site Plan (the "UGE"). (Pet. Ex. 3C, 3D, 22C, 22D). The UGE will be installed underneath the stream, the forest buffer, the line of trees, and the vegetation on either side of the stream. On Parcel 144, the UGE will continue beneath the fence and stream buffer ultimately connecting to the BGE interconnector.

On the eastern side of Solar Facility 144/121 are nine specimen trees. Additionally, within the area of the U-shaped gravel driveway of Solar Facility 144/121, exists another specimen tree as well as other trees and vegetation. (Pet. Ex. 3A, 3B, 20, 22A, 22B). (The specimen trees are classified as such because they measure at least 30" in diameter.) (Pet. Ex. 5).

The northern end of Parcel 144 contains not only the aforementioned stream, but numerous wetlands areas, as well as two delineated forest stands identified as 'Stand 1' and 'Stand 2' which were determined by Department of Environmental Protection and Sustainability ("EPS"). (Pet. Ex. 5, 20). Stand 2 continues from the northern end of Parcel 144 and extends along the eastern boundary of Parcel 144/121. (Pet. Ex. 5, 20). In addition, the northern end of Parcel 144 is located within a 100 ft. floodplain. (Pet. Ex. 3A, 3B, 22A, 22B).

STANDARD OF REVIEW

Pursuant to Baltimore County Charter, Article VI, Section 603, this Board heard this case *de novo*.

SOLAR FACILITIES LAW

On July 17, 2017, the County Council enacted Bill 37-17 permitting solar facilities by special exception in certain zones, including RC2, RC4, RC5, and RC8. BCZR, §4F-102.A. The County Council imposed limits on the number of facilities per councilmanic district (*i.e.* 10 per district), and on the maximum area for each facility (*i.e.* the amount of acreage that produces no more than 2 megawatts alternating current (AC) of electricity). BCZR, §4F-102.B.1 and 2.

In addition to the special exception factors, there are 10 requirements set forth in BCZR, §4F-104.A:

> 1. The land on which a solar facility is proposed may not be encumbered by an agricultural preservation easement, an environmental preservation easement, or a rural legacy easement.
>
> 2. The land on which a solar facility is proposed may not be located in a Baltimore County historic district or on a property that is listed on the Baltimore County Final Landmarks List.
>
> 3. The portion of land on which a solar facility is proposed may not be in a forest conservation easement, or be in a designated conservancy area in an RC 4 or RC 6 Zone.
>
> 4. Aboveground components of the solar facility, including solar collector panels, inverters, and similar equipment, must be set back a minimum of 50 feet from the tract boundary. This setback does not apply to the installation of the associated landscaping, security fencing, wiring, or power lines.
>
> 5. A structure may not exceed 20 feet in height.
>
> 6. A landscaping buffer shall be provided around the perimeter of any portion of a solar facility that is visible from an adjacent residentially used property or a public street. Screening of state and local scenic routes and scenic views is required in accordance with the Baltimore County Landscape Manual.
>
> 7. Security fencing shall be provided between the landscaping buffer and the solar facility.
>
> 8. A solar collector panel or combination of solar collector panels shall be designed and located in an arrangement that minimizes

> glare or reflection onto adjacent properties and adjacent roadways, and does not interfere with traffic or create a safety hazard.
>
> 9. A petitioner shall comply with the plan requirements of § 33-3-108 of the County Code.
>
> 10. In granting a special exception, the Administrative Law Judge, or Board of Appeals on appeal, may impose conditions or restrictions on the solar facility use as necessary to protect the environment and scenic views, and to lessen the impact of the facility on the health, safety, and general welfare of surrounding residential properties and communities, taking into account such factors as the topography of adjacent land, the presence of natural forest buffers, and proximity of streams and wetlands.

There are also provisions regarding maintenance of the facilities:

> § 4F-106. - Maintenance.
>
> A. All parties having a lease or ownership interest in a solar facility are responsible for the maintenance of the facility.
>
> B. Maintenance shall include painting, structural repairs, landscape buffers and vegetation under and around solar panel structures, and integrity of security measures. Access to the facility shall be maintained in a manner acceptable to the Fire Department. The owner, operator, or lessee are responsible for the cost of maintaining the facility and any access roads.
>
> C. Appropriate vegetation is permitted under and around the solar collector panels, and the tract may be used for accessory agricultural purposes, including grazing of livestock, apiculture, and similar uses.
>
> D. The provisions on this section shall be enforced in accordance with Article 3, Title 6 of the County Code.

A solar facility which has reached the end of its useful life must be removed in accordance with §4F-107.

In order to grant a request for a special exception under BCZR, §502.1, it must appear that the use for which the special exception is requested will not:

> A. Be detrimental to the health, safety or general welfare of the locality involved;

B. Tend to create congestion in roads, streets or alleys therein;

C. Create a potential hazard from fire, panic or other danger;

D. Tend to overcrowd land and cause undue concentration of population;

E. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements;

F. Interfere with adequate light and air;

G. Be inconsistent with the purposes of the property's zoning classification nor in any other way inconsistent with the spirit and intent of these Zoning Regulations;

H. Be inconsistent with the impermeable surface and vegetative retention provisions of these Zoning Regulations; nor

I. Be detrimental to the environmental and natural resources of the site and vicinity including forests, streams, wetlands, aquifers and floodplains in an R.C.2, R.C.4, R.C.5 or R.C.7 Zone.

In *Schultz v. Pritts*, 291 Md. 1, 22-23, 432 A.2d at 1331 (1981), the Court of Appeals held that "the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and therefore should be denied, is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone."

The Court of Appeals in *People's Counsel for Baltimore County v. Loyola College in Md.* 406 Md. 54, 106, 956 A.2d 166 (2008) upheld that longstanding *Shultz* analysis, explaining that a special exception use has "certain [inherent] adverse effects....[which] are likely to occur". In its analysis, the *Loyola* Court observed that "[t]he special exception adds flexibility to a comprehensive legislative zoning scheme by serving as a 'middle ground' between permitted use and prohibited uses in a particular zone." *Id.*, 406 Md. at 71, 956 A.2d at 176 (2008).

The *Schultz* and *Loyola* Courts, and more recently in *Attar v. DMS Tollgate, LLC*, 451 Md. 272, 285 (2017) have expressly recognized that "[a] special exception is presumed to be in the interest of the general welfare, and therefore a special exception enjoys a presumption of validity." (See also *Loyola*, 406 Md. at 84, 88; 105 *Schultz*, 291 Md. at 11). Based on this standard, once an applicant puts on its *prima facie* evidence in support of a special exception, the opponents must then "set forth sufficient evidence to indicate that the proposed [use] would have any adverse effects above and beyond those inherently associated with such use under the *Schultz* standard." *Attar*, 451 Md. at 287. (*See Montgomery County v. Butler*, 417 Md.271, 276-77 (2010) (opponent must show "non-inherent adverse effects" to "undercut the presumption of compatibility enjoyed by a proposed special exception use"). (*See also, Clarksville Residents Against Mortuary Defense Fund, Inc. v. Donaldson Properties*, 453 Md. 516, 543 (2017) ("there is a presumption that the [special exception] use is in the interest of the general welfare, a presumption that may only be overcome by probative evidence of unique adverse effects").

MOTIONS TO DISMISS

The Protestants argued that this case is not ripe for consideration by the Board until the limited exemption process is determined, and the development plan has finished proceeding through the County agencies. The Protestants emphasized that the County agencies may or may not determine that the proposed Site Plan meets with County approval. The Protestants contend that the development process and the County comments impact the scope of review under both BCZR, Article 4F and BCZR, §502.1. In the Protestants' view, the County agencies could advise that zoning relief (other than special exception requested here) is required. As a result, they contend that any opinion and order by this Board would be advisory; therefore the case should be dismissed.

Protestants further allege that because BCZR, §4F-102.B.4 restricts the number of solar facilities to 10 per councilmanic district, the two proposed solar facilities would exceed that limit. This contention is based on the list of solar facilities maintained by the Zoning Office.

In response, Petitioners highlighted that under BCC, §32-4-221, the Petitioners have the option to file for zoning relief first, or to combine the zoning relief along with development plan approval. From the Petitioners' perspective, the use of a property under the requested zoning relief needs to be determined before a financial investment is made on a development plan. Further, if an exemption under BCC, §32-104(b) is granted, a development plan will be reviewed by the County agencies. In regard to the limit on the number of solar facilities per councilmanic district, Petitioners respond that the maximum number of solar facilities is based on the building permits issued.

The Board agrees with the Petitioners on the Motion to Dismiss in that BCC, §32-4-221 permits an applicant to choose whether to combine zoning relief with a development plan case, or to bifurcate those issues. As such, this Board will address the limited exemption requested under BCC, §32-4-106(a)(1) herein.

EVIDENCE

Testifying for the Petitioners were six witnesses.

1. Nick Leffner, PE.

Nick Leffner, PE was accepted by the Board as a professional engineer with particular expertise in the areas of planning, zoning and limited exemption applications. Mr. Leffner was

hired by Power Factor to prepare the Site Plan. (Pet. Ex. 3C, 3D, 22C, 22D).[1] Mr. Leffner testified that neither of the two Parcels at issue were used for farming.

Explaining the various environmental features of these Parcels, Mr. Leffner testified that neither of the two solar facilities would be located within the streams, wetlands, stream buffers, forest stands or floodplains. He advised that no environmental variances or waiver would be requested as none would be needed. He explained that the County Environmental Impact Review department ("EIR") approved the limits of disturbance to the environmental features.

Mr. Leffner testified that the initial proposal submitted to the County in the Petition for Special Exception was for one solar facility to be located entirely on Parcel 144. Having received unfavorable comments from EPS on December 24, 2018 due to the impacts on forest stands, floodplains, wetlands, streams, and forest buffers presented under that proposal, an Amended Petition was filed on May 17, 2019, proposing the two solar facilities here.

Proceeding through the requirements of BCZR, §4F-104, Mr. Leffner opined that the proposed solar facilities will not be located on land encumbered by an agricultural preservation easement, an environmental preservation easement or a rural legacy easement. (BCZR, §4F-104.A.1). Similarly, the proposed land areas are not located within a Baltimore County historic district or on the Baltimore County Final Landmarks List. (BCZR, §4F-104.A.2). Likewise, the land is not located in a forest conservation easement or designated conservancy area (BCZR, §4F-104.A.3).

Mr. Leffner stated that the aboveground components of each solar facility including the solar collector panels, inverters and similar equipment would be set back a minimum of 50 feet

[1] The Board required that Mr. Leffner correct the Site Plan (Pet. Ex. 3C, 3D) due to several mistakes and resubmit new Site Plans at the next hearing date. (Pet. Ex. 22C, 22D).

from the tract boundary. (Pet. Ex. 3C, 3D, 22C, 22D). (BCZR, §4F-104.A.4). Fifth, neither solar facility will exceed 20 ft. in height; the actual height of each panel is 9 ft. (BCZR, §4F-104.A.5).

With regard to the landscape buffer requirement, aerial photographs of the Parcels show existing trees and vegetation. (Pet. Ex. 4A and 4B). Mr. Leffner described the existing trees as being of varying heights and density with small breaks in the vegetation along Falls Rd. He stated that the topography generally slopes from the northeastern end into a bowl shape, causing both Parcels to sit at a lower elevation than Falls Rd. (§4F-104.A.6). (Pet. Ex. 20). The Landscape Plan has not been approved by the County. With regard to the security fences, Mr. Leffner reiterated that two 7 ft. black vinyl coated chain link fences will be installed around each of the solar facilities. (§4F-104.A.7).

As to the special sxception factors, it was Mr. Leffner's opinion that the proposed solar facilities would have no impact on the health, safety or general welfare of the locality. In support of this position, he highlighted that each solar facility met the 50 ft. setback and that the proposed landscaping would provide a screen to the neighboring properties. Mr. Leffner commented that a 6 ft. high, 125 ft. long privacy fence would be installed between the southern property line of Parcel 121 and the adjacent neighbor, Linda Ault. In addition, Mr. Leffner said that the Petitioners moved the access driveway for Solar Facility 144/121 away from the property line of adjacent neighbor John Dwyer. (BCZR, §502.1.A).

With regard to the tendency of these solar facilities to cause congestion along Falls Rd., Mr. Leffner stated that because these solar facilities are unmanned, there will be no congestion. (BCZR, §502.1.B). As for the potential to cause fire or other danger, Mr. Leffner mentioned that all solar facilities are required to comply with national and local electrical codes. The fire department will have access via a box posted on a mount at one of the entrance driveways. (BCZR,

§502.1.C). Because this use does not generate traffic or attract people, it was Mr. Leffner's position that there would not be overcrowding of the land or undue concentration of population. (BCZR, §502.1.D).

He further testified that there is no interference with schools, parks, water, sewerage, transportation or other public improvements as these Parcels are located outside the Urban Rural Demarcation Line ("URDL"). (BCZR, §502.1.E). There is no impact on light or air as the maximum height of the solar facilities is 9 ft. and therefore the adjacent homes will not be shadowed. (BCZR, §502.1.F). Mr. Leffner opined that since the proposed solar facilities are permitted by special exception, they are consistent with the purposes of the RC2 and RC8 zoning regulations. Additionally, because neither Parcel was used for farming there is no negative impact on agriculture. (BCZR, §502.1.G).

With regard to consistency with impermeable surface and vegetative retention provisions of BCZR, §502.1.H and detrimental impacts on environmental and natural resources under BCZR, §502.1.I, including forests, streams, wetlands, aquifers and floodplains, Mr. Leffner's testimony was that these solar facilities did not impact the environment. He highlighted that the topography of both Parcels drains toward the stream which runs between those Parcels. As such, drainage from the solar facilities will fall toward that stream.

With regard to the Petition for Variance requesting a 0 ft. setback in lieu of the 50 ft. setback from the property line between Parcel 144 and Parcel 121, Mr. Leffner relied upon the environmental constraints of both parcels (streams, the forest buffer, the floodplains, the wetlands, the downward slope of the land from RC8 land in northern end to a converging point at the stream between the parcels; steep slopes on eastern end of Parcel 144/121; the shape of Parcels 144 and 121; and the specimen trees, particularly the specimen tree located in the middle of Parcel 121) for

his opinion that the Parcels were unique and that, as a result, the Petitioners would suffer a hardship if the solar facilities were not approved.

In support of his opinion that the Petitioners would suffer a practical difficulty, Mr. Leffner stated that, if the 50 ft. setback was required from the internal property line between Parcels 144 and 121 under BCZR, §4F-104.A.4, the scope of the project area would be reduced by one-third (1/3). This which would require the removal of the solar panels within 50 ft. setback area. If the removal of solar panels occurred, he stated that the project would not be financially viable for the Petitioners.

With regard to the Application for a Limited Exemption from the development process under BCC, §32-4-106(a)(1)(vi), Mr. Leffner testified that the solar facilities satisfied the term "minor commercial structure". He relayed that this use is not for human habitation, does not use water, is not a business use, and has no buildings. Consequently, it was his position that the Site Plan should be exempt from the development process and the Petitioners should be permitted to apply directly for a building permit.

On cross, Mr. Leffner stated that the UGE would be installed by using a horizontal directional drill which would be bored ("directional boring") underneath the stream running between Parcel 144 and Parcel 121. The horizontal distance to be drilled would be greater than 200 ft. The drilling would occur at an unknown depth. He admitted that the root system for the trees which line that stream might be impacted by the directional boring and that, in the event a tree root system is damaged, an environmental variance would be required.

It was Mr. Leffner's opinion that under BCC, §33-3-112(b)(2)(i)(ii)(iii), directional boring did not violate the prohibition against disturbance of vegetation and soil within the forest buffer, and that it did not require an alternatives analysis under BCC, §33-3-112(c)(2). (Prot. Ex. 2). Mr.

Leffner did not agree that a UGE was a 'utility' under BCC, §33-3-112(c)(2)(i)(ii) which would only be permitted if EPS approved an alternatives analysis demonstrating that no other feasible alternative exists, and that minimal disturbance would take place.

Mr. Leffner maintained this position notwithstanding comments from EPS dated June 3, 2019 and July 3, 2019 which each stated that: "...the underground electric cable currently proposed through the Forest Buffer Easement and under the stream will require review and approval by EPS of an alternatives analysis, and must be included in the project's limit of disturbance." (Prot. Ex. 3A and 3B).

During cross examination, Mr. Leffner admitted that the reason the Petitioners are proposing to construct two solar facilities rather than one, is due to the stream which bisects them. He conceded that while one solar facility could be constructed, it was not a financially viable option for the Petitioners. He further admitted that these solar facilities will result in clearing of trees in four areas as follows: (1) the line of existing trees and vegetation in the center of Solar Facility 144/121; (2) the line of existing trees and vegetation on the northern end of Solar Facility 144/121; (3) the line of existing trees and vegetation in the center of Solar Facility 144; and (4) the line of existing trees and vegetation around the 'S' shaped and 'U' shaped gravel driveways. In answering this line of questions, he was not able to provide a count of the number of trees which would need to be removed for these solar facilities to be constructed.

2. Stephen Barrett - Glare Expert.

The Petitioners contracted with Stephen Barrett, a principal in Barrett Energy Resources Group located in Concord, MA to conduct a study on whether the proposed solar facilities panels will produce glare from the sun's rays. (BCZR, §4F-104.A.8). The Board accepted Mr. Barrett as an expert in glare analysis. (Pet. Ex. 10).

Toward that end, he prepared a glare study report using computer software known as *GlareGauge* which is accepted by the U.S. Federal Aviation Administration, and is now considered the industry standard. (Pet. Ex. 11). Mr. Barrett was involved in the development of this model which became part of the 2013 FAA Guidance document for solar projects at airports, and is now applied when determining glare in residential areas. The program only considers the solar array, the movement of the sun and the position of observers; it does not take into account terrain, vegetation, or other structures which might obstruct the observer's view of glare. *Id.* The program determines the path of the sun throughout the year.

Mr. Barrett testified that the FAA glare model includes a 3-step process which he applied in this case. The first step is to identify the receptors (adjacent properties, roads, motor vehicles) where glare from the proposed solar panels could potentially reflect the sun's rays. Without considering terrain, vegetation or structures, he then located 17 receptors along Falls Rd. (14 residences and 3 motor vehicle points of impact). The selection of receptor sites was derived from Google Earth. He discovered that 10 of the 17 receptors have the potential for glare (for longer than 5 minutes annually). He is concerned only with whether glare is produced from a selected location, as glare is a function of where the sun is in the sky in relation to the time of year. His focus was on potential glare from these locations due to sun rising in the east and setting in the west, while recognizing that the panels will be fixed toward the south.

Mr. Barrett next factored in the existing vegetation and terrain. His report indicated that there would be no glare from March through September each year. He emphasized the surrounding evergreen trees do not lose their needles during the winter. In addition, the solar panels have an anti-reflective coating which, while producing electricity, does not produce glare. The solar panels will face south to maximize solar electricity. As a result, while the panels will not be invisible, he

opined that there will not be any public hazard or nuisance; any potential glare will be limited. The additional proposed landscaping will also reduce any potential for glare.

The second step of the model factors is the existing trees, vegetation and terrain. Mr. Barrett opined that the existing natural features on this Property obstruct the glare at the receptors. In particular, the shape of the Property is that of a bowl which will minimize and diffuse any glare produced. The third step considers the additional landscaping proposed. In this case, he testified that the proposed landscaping minimizes the potential for glare.

In summary, Mr. Barrett opined that no glare of low or high intensity will be created.

3. Jeffrey Perlow, Zoning Review Office.

Jeffrey Perlow, Planner II of the Zoning Review Office for Baltimore County, was subpoenaed by the Petitioners to testify. Mr. Perlow explained that, pursuant to BCZR, §4F-102.B.3 and 4, the Zoning Office has kept a list of petitions for solar facilities and the building permits issued per councilmanic districts. (Pet. Ex. 18). He confirmed that while there have been 11 petitions, as of July 8, 2019, no permits have been issued for the 3rd District. (Pet. Ex. 18). Lastly, Mr. Perlow confirmed that the Zoning Office would continue to review petitions until the maximum 10 permits are issued.

4. Michael Kulis - Natural Resource Specialist II, Environmental Impact Review.

Michael Kulis of EIR, was also subpoenaed by the Petitioners to testify. It was Mr. Kulis' job to review this Petition. By letter dated June 6, 2019, Mr. Kulis approved the wetland delineations, but disapproved the forest stand delineations due to the specimen trees which are located within the solar array areas. (Pet. 21). Mr. Kulis also confirmed that the County had not

yet received a Forest Conservation Plan for the northern part of Parcel 144 which must be submitted prior to the issuance of the grading and building permits. (Pet. Ex. 21).

With regard to the analysis of steep slopes and erodible soils, he testified that the minimum required setbacks of 100 ft. from a stream, and 25 ft. from edge of a wetland, were not adequate here due to the steep slopes. Thus, by letter dated June 6, 2019, Mr. Kulis disapproved of that analysis and requested revisions. (Pet. 21).

Mr. Kulis mentioned that, if left in their natural state, a forest would grow near the stream. With regard to potential disturbance of the forest buffer by the UGE, he added that EIR would require and review the limits of disturbance on the grading plan to make certain that the connection points were contained within each solar array and not within the forest buffer. Because it has been proposed that the UGE will travel underneath the stream and forest buffer, Mr. Kulis feels that the Forest Buffer law is not violated. He admitted that if the UGE cannot avoid impacts, then impacts must be minimized. He clarified that as long as the stream is not disturbed, the County would not require an Alternative Analysis. The County has discretion in determining the location for the crossing area and the depth of the UGE. Finally, because EIR will need to sign off on the building permit(s), EIR will have further revisions to the Forest Stand Delineations and Steep Slopes Analysis.

On cross examination, Mr. Kulis explained that while there will be impacts to environmental resources here, EIR views these as minimal. Although there will be violations of BCC §33-1-112(c)(ii) and (iii) with regard to clearing vegetation and soil disturbance within the Forest Buffer, EIR has an unwritten policy of permitting what EIR views as minimal. He further conceded that while an Alternatives Analysis is legally required under BCC §33-1-112(c), EIR does not require one if the stream is not disturbed. Here, EIR believes the UGE is not a disturbance.

EIR views the Forest Buffer law as protecting water quality which will not be affected by the proposed UGE.

5. Jon Kraft – Landscape Architect.

Jon Kraft was admitted as an expert landscape architect licensed in the State of Maryland. (Pet. Ex. 23). Although Mr. Kraft prepared a landscape plan, the Board was not presented with that plan. While it has not been formally filed with the County, the County's Landscape Architect has preliminarily reviewed it. At the recommendation of the County, Mr. Kraft changed the gravel driveway for Parcel 121 to an 'S' shape. Mr. Kraft opined that his Landscape Plan meets the requirements of the Comprehensive Manual of Development Policies, the Baltimore County Landscape Manual, and the BCZR. Along Falls Rd., he stated that diverse trees will be planted measuring 45 ft. (30 ft. is required) to supplement the existing ones. Along the Fowble property, proposed landscaping measuring 25 ft. (10 ft. is minimum) will be installed. The proposed landscaping will consist of various deciduous trees in layers of shrubs and trees. Mr. Kraft explained that approval of the final Landscape Plan is an ongoing process.

6. Andrew Streit – Power Factor.

Andrew Streit testified as the representative of Power Factor where he has been employed as the Director of Business Development for 1½ years. Mr. Streit explained that Power Factor has never installed a Community Solar Facility. Power Factor's experience with solar is installing residential roof top units and solar facilities on military bases. It has installed a ground mounted solar facility in South Carolina, but not in Baltimore County. Power Factor is not a Subscriber Organization under the Community Solar Energy Generating Systems Pilot Program under MD Code Ann., PU, §7-306.2 ("Community Solar Program"). Mr. Streit testified that, an unrelated

entity namely, Meade Communities, Inc. ("Meade"), has been approved by the Public Service Commission ("PSC") as a Subscriber Organization for this project.

Initially, Mr. Streit testified that Meade would be the entity constructing both solar facilities, would be responsible for connecting the solar facilities to the BGE grid, and would prepare the application for BGE approval. Additionally, he stated that Meade will install the meter(s) needed to monitor the amount of electricity generated to the grid. Meade will maintain the list of subscribers buying electricity from the proposed facilities. Meade will also post the security bond required under BCZR, §4F-105.

Mr. Streit testified that the solar panels on both facilities will not rotate; they will be fixed facing south. Together these solar facilities will generate 1.85 mg of AC electricity. He explained that the solar panels do not emit chemicals. Beneath the panels will be ground cover. Rain will clean the panels. With regard to noise, there will be a humming sound which can be heard on-site. With regard to the potential for fire, Mr. Streit testified that he is aware of six fires on roof top solar installations. There is a potential for the transformer to catch on fire.

On cross examination, Mr. Streit admitted that Power Factor is paying for OSHA violations due to an incident where one of their employees was electrocuted.[2] He stated the Power Factor would enter into a 25-year lease with Holly Springs but later admitted that the lease would be assigned to Meade. Power Factor has never connected separate solar facilities underneath a stream.

He also conceded that the solar panels to be installed have an efficiency rating of 18% but that panels with a higher efficiency rating do exist. A high efficiency rating would be 22% and the highest possible rating is 42%. If a higher efficiency panel were used, he agreed that less panels would be needed. He did not know the minimum amount of land needed to produce 1.85

[2] The Board did not admit into evidence the OSHA violation documents offered by Protestants (Prot. Ex. 8).

mg. When asked about the number of inverters, Mr. Streit testified that there would be 35 inverters within each of the solar facilities.

Mr. Streit admitted that if they were to run power lines above ground (rather than using an UGE), it would be more expensive. Additionally, if the solar facilities were separately connected to the BGE interconnector, it would require additional BGE approvals.

He acknowledged that Power Factor's role in regard to this project will be as a maintenance contractor. Power Factor will not have a partnership agreement or other business agreement with Meade. There is no common ownership between Power Factor and Meade. With regard to the ownership of the equipment for each solar facility to be installed, Mr. Streit initially testified that Meade would own the equipment, but then stated that the solar facilities would be owned by another entity namely, "Onyx Renewable Group" ("Onyx"), a New York based energy business. Onyx would enter into an agreement with Holly Springs through Meade. He then indicated that Power Factor would have a maintenance agreement for the equipment with Onyx and would apply for the building permit under BCZR, §4F-105.

Protestants' Case.

1. Glenn Fowble – 3306 Baker's Schoolhouse Rd., Freeland, MD 21053. Mr. Fowble owns the property at 18728 Falls Rd., Hampstead, MD 21074 which is a 6 ½ acre unimproved piece of land. His mother, Mary Fowble lives at 18719 Falls Rd., Hampstead, MD 21074, where Glenn Fowble lived for 20 years as a child. Mr. Fowble will inherit his mother's property. Glenn Fowble is concerned that the solar panels will produce glare on his mother's property even with the proposed trees to be planted. At the present, there is no vegetation between her house and the Solar Facility 144. (Prot Exs. 4A-4D). Even as matured, the proposed landscaping will not block

her view of the solar panels. The installation of the solar facilities will decrease their property values.

Mr. Fowble is also concerned about the environmental factors on Parcels 144 and 121. In particular, he pointed out that Compass Run runs through both his mom's and his property. Compass Run is a tributary to Prettyboy Reservoir. He believes that the floodplains on Parcels 144 and 121 will be negatively affected by the water runoff from the panels.

2. Wayne Yelle. 18708 Falls Rd., Hampstead, MD 21074. Wayne Yelle has lived in his home for 20 years. His wife has lived in the same home for 41 years. His house sits on 1.23 acres, is 10-12 ft. above Falls Rd., and is approximately 50 yards from Falls Rd. He presented the Board with photographs of his property. (Prot. Ex. 10A-10E). He testified that he is concerned that he will be staring at the solar facilities even if additional landscaping is planted. This view will devalue his property.

3. Theresa Moore. Executor Director of Greenspring Valley Planning Council, 118 West Pennsylvania Avenue, Towson, MD 21204. Ms. Moore testified on behalf of the Valleys Planning Council ("VPC") who, in accordance with Rule 8 papers, voted to oppose the special exception request here. (Prot. Ex. 11). She investigated the background of Holly Springs and its owners. In this case, she discovered that Holly Springs is a 501(c)(3) organization formed to preserve land and to educate the public. (Prot. Ex. 12). The non-profit corporation has three board members, two of whom are married. She stated that the marital status violates the IRS rule that 51% of the board cannot be related. She reviewed Holly Springs' IRS form 990 which indicated that Holly Springs reported more in rent than contributions. (Prot. Ex. 12). She tried to make sense out of the conservation easements listed but acknowledged that no agricultural preservation,

environmental or rural legacy easements are recorded in the Land Records for these Parcels. She also did not find any easements.

VPC opposes the special exception here because it involves two separately fenced-in solar facilities connected by an UGE. There are two separately deeded parcels of land. (Prot. Ex. 14). Ms. Moore emphasized that the Community Solar Program prohibits solar facilities on adjacent properties. (Prot. Ex. 15). In this case, trees will be cut down and tunneling underneath a stream will occur in order to make this project work.

4. Renee Hamidi 8 Sparks Station Rd., Sparks, MD. Renee Hamidi is the Executive Director of Manor Conservancy. Ms. Hamidi researched conservation easements for Holly Springs in the Land Records of Baltimore County but did not find any. As Executive Director, she works with land trusts in Baltimore County to preserve land using conservation easements. She testified that the IRS regulation requires perpetuity of the easements.

5. Kathleen Pieper – 4310 Beckleysville Rd., Hampstead MD 21074.

Ms. Pieper is a retired biochemical engineer who worked at Proctor and Gamble. She lives a 4310 Beckleysville Rd., Hampstead MD 21074. She is also the President of the North County Community Group, LLC ("North County"); is on the Prettyboy Reservoir Council; and on the BGE Community Advisory Council. Ms. Pieper testified in her individual capacity and as President of North County pursuant to Rule 8 papers. (Prot. Ex. 16).

North County is a volunteer organization of 500 members formed in 2015 with boundaries from the Maryland-Pennsylvania line in the north, York Rd. in the east, the Baltimore/Carroll County line in the west and Mt. Carmel Rd. in the south. Parcel 144 and 121 are within the boundaries of North County.

Ms. Pieper presented information to the Board showing all of the BGE Subscriber Organizations with projects completed or pending under the Community Solar Program. (Prot. Ex. 18 and 19). She pointed out that Meade's subscriber application ("Meade's Application") filed in November of 2018, had not been approved by the PSC for this project as of October 7, 2019 as evidenced by the BGE Community Solar Pilot Program Application List. (Prot. Ex. 18).

A supplemental submission to the Meade Application entitled "Attachment B: Planned Project Information" (which was filed by another entity, Corvias Military Living, LLC ("Corvias"), indicating that it was the parent company of the managing member of Meade), was filed. Meade did not check the boxes that it will own or operate the solar facilities but that the facilities would be collectively controlled by a group of subscribers. (Prot. Ex. 20).

On the supplement, Corvias indicated that the owner of these facilities would be "Solar Mission 1, LLC" and the operator is "Onyx Asset Services Group, LLC". (Prot. Ex. 20). It further states that Meade is not the developer, contractor or owner of these projects; Meade is the Subscriber Organization which handles the metering and billing of the subscribers. Corvias oversees the billing. (Prot. Ex. 20). With this evidence, Ms. Pieper expressed her concern that an unknown entity would be responsible in event there is a problem with the solar facilities.

Ms. Pieper testified that on August 30, 2019, Power Factor also submitted a Subscriber Application signed by both Mr. Streit and George Lang, IV ("Mr. Lang") (the "Power Factor Application"). (Prot. Ex. 19). On the Power Factor Application, Power Factor indicated that it would "develop", "build" and "operate" the facilities at issue. (*Id*). That application also stated that Power Factor "has no affiliated approved Subscriber Organizations." (*Id*). Ms. Pieper further highlighted that Mr. Streit and Mr. Lang both affirmed by sworn Affidavit attached to the Power

Factor Application that the applicant, Power Factor, had no actions or fines taken or pending against it and specifically that:

> The Applicant, including any of its affiliates engaged in the sale of electricity or related services, the general partners, corporate officers or directors, or limited liability company members, managers or officers of the Applicant or its affiliates:
>
> 1. Has had no civil, criminal or regulatory sanctions or penalties imposed against it within the previous ten years pursuant to any State or Federal consumer protection law or regulation; and has not ever been convicted of a felony; or alternatively
>
> 2. Has disclosed by attachment all such sanctions, penalties or convictions.

(Prot. Ex. 19). Ms. Pieper expressed her concern that the both Mr. Streit and Mr. Lang were not truthful about the pending OSHA violation as admitted by Mr. Streit for which Power Factor was paying a fine. (*Id*). Ms. Pieper also testified that, based on her research, Power Factor did not have the experience to design, build, operate or decommission ground-mounted community solar facilities.

Rebuttal.

Andrew Streit. In light of the evidence produced by the Protestants, Mr. Streit testified again in rebuttal in an attempt to change his testimony in accordance with counsel's leading questions. Mr. Streit testified that Power Factor was a contractor responsible for building and maintaining the facilities. Power Factor was charged with obtaining the zoning approvals, getting all approvals through BGE and PSC, and obtaining all building and electrical permits from Baltimore County. Mr. Lang, the owner of Power Factor, has a Maryland Home Improvement Commission License (MHIC) and also holds a Master Electrician license.

Mr. Streit corrected his previous testimony that Meade still needed to get PSC approval to be a Subscriber Organization in this case. Power Factor also applied to be a Subscriber Organization for these facilities but has not yet been approved by the PSC. Because of this, Power Factor is not permitted to enter into the interconnection agreement with BGE. Power Factor has built over 1,000 solar facilities (over 50 mg) on military properties, none of which are located in Baltimore County. Corvias is the largest owner of military housing. The Department of Justice has jurisdiction over these military properties. Baltimore County permits are not needed to construct solar facilities on military bases.

Mr. Streit agreed that the lease between Power Factor and Holly Springs will be assigned to Meade. He changed his testimony that "investors" such as Onyx (not Meade) would own the solar facilities equipment. Onyx was providing the funds to buy the equipment and post the bond required under BCZR §4F-105.A. Holly Springs will have no involvement with the maintenance, ownership or operation of the solar facilities. In regard to a decommissioning agreement, Power Factor and/or Onyx would be responsible.

DECISION

A. Special Exception

As set forth above in BCZR, §4F-102.A, solar facilities are only permitted by special exception under the factors set forth in BCZR §502.1. The Board unanimously finds that the evidence presented in support of proposed solar facilities at issue failed to satisfy several of the special exception factors in that these solar facilities:

> (1) would be detrimental to the health, safety or general welfare of the locality involved (§502.1.A);
>
> (2) would be inconsistent with the spirit and intent of the BCZR (§502.1.G);

> (3) would be inconsistent with the vegetative retention provisions of the BCZR (§502.1.H); and would be detrimental to the environmental and natural resources of the site and vicinity including forest, streams, wetlands, and floodplains and R.C.2 zone (§502.1.I).

This Board was not persuaded by the evidence presented by the Petitioners and found the evidence presented by the Protestants more convincing as follows:

(1) Detrimental to Health, Safety and General Welfare of the Locality Involved – BCZR, §502.1A.

With regard to the health, safety and welfare of the Hampstead area, the Board specifically finds that Power Factor lacks the knowledge and the experience with community solar projects; that the Petitioners were unclear about relevant details about the proposed facilities; that the Petitioners were less than forthcoming on the Power Factor Application and in its testimony before this Board; the Petitioners lack the financing necessary to construct the solar facilities here and to post bonds required under the Community Solar Program law and BCZR, §4F-105.A, and as a result of these facts, requires the involvement of multiple non-petitioner entities over whom this Board has no authority.

First, Power Factor, through Andrew Streit, discussed its intention to become part of the Community Solar Program as set forth in MD Code Ann., PU, 7-306.2 *et seq*. However, it is undisputed that Power Factor's experience in the solar industry is limited to installing residential rooftop panels and solar facilities on military bases. The installation of solar facilities on military bases does not require approvals under the Community Solar Program or through Baltimore County. While the Petitioners' inexperience alone is not dispositive, that fact, in combination with Mr. Streit's testimony that 35 inverters would be installed within each solar facility, revealed a lack of knowledge about community solar facilities which use one inverter.

Second, Power Factor has not been approved as a Subscriber Organization by the PSC. (Prot. Ex. 19). As a result, in order to enter into the interconnection agreement with BGE, Power Factor needs Meade to be the Subscriber Organization. Yet, according to a list of approved Subscriber Organizations maintained by BGE under the Community Solar Program, Meade is not an approved Subscriber Organization for this project, as that list . identifies community solar projects with expected operation dates through December 31, 2020. (Prot. Ex. 18).

In reviewing Meade's Application (Prot. Ex. 20), the Board finds the statement submitted by Corvias on behalf of Meade, also contradicted Mr. Streit's testimony. Mr. Streit testified that Meade was to be the owner, and developer of the solar facilities. Through the Protestants' evidence, we learned about four non-petitioner entities that would be controlling these facilities. Mr. Streit testified that Onyx would be the owner and Power Factor would be the operator. Meade indicated on its Application that "Solar Mission I, LLC will be the owner; Onyx will be the operator; Meade would be the Subscriber Organization; and Corvias would oversee the billing. It was not lost on this Board that all of this inconsistency, and lack of candor, came to light through evidence offered by the Protestants, not the Petitioners. More importantly, it became clear that Power Factor's role was limited to that of a maintenance contractor.

Further, although Mr. Streit testified that Power Factor is relying on Meade to be the Subscriber Organization, Mr. Streit did not mention on direct exam that Power Factor had also applied to be a Subscriber Organization in August of 2019. (Prot. Ex. 19). Again, it was the Protestants, not the Petitioners, who produced the Power Factor Application. (Prot Ex. 19). Through cross examination, the Protestants pointed out that there were several false statements and omissions on that application which was executed by Mr. Streit and/or Mr. Lang under oath.

While the Board did not admit the OSHA violation document into evidence, Mr. Streit admitted in cross examination that Power Factor did not disclose the OSHA violation on the Power Factor Application. He explained that Power Factor is paying a fine for the electrocution of an employee. Yet, on the Power Factor Application, Power Factor checked the box that there were no actions taken against it:

> 8. Actions Against Applicant. Provide the following information or the Applicant.
>
> □ Actions such as Suspensions/Revocations, Limitation, Reprimands, Fines, Consent Decrees, or other similar actions have been taken or are pending against the Applicant. If checked, provide an attachment describing the action; and include docket numbers, offense dates, and case numbers, if applicable.
>
> ■ No such action has been taken.

Moreover, on the Affidavit attached to the Power Factor Application, Mr. Lang swore under oath that for the previous 10 years, neither Power Factor, nor any of its members, managers, officers had any civil, criminal or regulatory sanctions or penalties imposed against it:

> 1. Has had no civil, criminal or regulatory sanctions or penalties imposed against it within the previous ten years pursuant to any State or Federal consumer protection law or regulation, and has not ever been convicted of a felony; or alternatively
>
> 2. Has disclosed by attachment all such sanctions, penalties or convictions.

(Prot. Ex. 19).

Next, on the Verification page of the application, Mr. Lang swore to the following:

> The Applicant understands that the making of false statement(s) herein may be grounds for denying the Application or, if later discovered, for revoking any authority granted pursuant to the Application.
>
> * * * * *
>
> That the facts above set forth are true and correct to the best of his/her knowledge, information, and belief and that he/she

> expects said Applicant to be able to prove the same at any hearing hereof.

(Prot. Ex. 19). In our view, these false statements and omissions, which were submitted to gain access to the Community Solar Program (not some other unrelated application), negatively impact the Petitioners' credibility in this case and is detrimental to the health, safety and welfare of the local.

Additionally, on the Power Factor Application, Power Factor did not disclose its affiliation/connection with Meade as a Subscriber Organization for this project. (Prot. Ex. 19, p. 10). Equally problematic for the Petitioners, Meade also failed to disclose its connection to Power Factor on the Meade Application. Even if there is no parent/subsidiary relationship between these entities, according to Mr. Streit, Power Factor will execute a 25 year lease with Holly Springs but then will assign this lease to Meade, thus establishing a relevant connection. The Petitioners also did not disclose that they had filed a Subscriber Application in August, 2019 which filing date occurred before the first hearing date before this Board.

The Board has determined that, in light of the omissions and inconsistencies, installing solar facilities on these Parcels will be detrimental to the safety and general welfare of this locality. Power Factor will only be a maintenance contractor and is the only entity to which the Board's Order will apply. It is undisputed that Holly Springs will not be involved with the solar facilities; its role is to collects rent payment under the lease.[3]

[3] MD Code Ann., PU, §7-306.2(d)(11) a Subscriber Organization may contract with third parties to finance, build, own or operate a community solar energy generating system. Here, the Petitioners are not the Subscriber Organization.

(2) Inconsistent with the Spirit and Intent of BCZR. (§502.1G).

The Board finds that the evidence is inconsistent with the spirit and intent of the BCZR as required by BCZR, §502.1.G. Specifically, the proposed solar facilities will be inconsistent with BCZR, §4F-105 and §4F-106. While Mr. Streit testified that Power Factor will apply for the building permit if the special exception is approved, we learned that Power Factor does not have the finances to post any bonds. BCZR, §4F-105 states that the applicant for the building permit shall also post the bond. Mr. Streit's testimony vacillated in that he initially testified that Meade would post the bond, and then stating that Onyx would post the bond.

Importantly, the Board is reminded that the purpose of the bond is to: "procure the repair of any unsafe or hazardous conditions under BCZR, §4F-106, or removal of a solar facility under Section 4F-107, in accordance with Section 3-6-402 of the County Code." In short, the Petitioners will not be responsible in the event that there is an "unsafe or hazardous condition" requiring such correction.

Similarly, this Board finds that the proposed ownership of the solar facilities by a non-petitioner entity, Onyx (or some other undisclosed entity), contradicts BCZR, §4F-406.A and B. The Board has been entrusted to determine who will own, operate and have control over solar facilities. Initially, Mr. Streit testified that Meade would own the facilities, then he stated that the facilities would be owned by "a group of investors". When pressed, he changed his testimony for a third time and claimed that Onyx, or a subsidiary of Onyx, may own the facilities.

BCZR, §4F-406.A and B require that all parties who have a lease or ownership interest in the solar facilities be responsible for maintenance of the solar facilities:

> A. All parties having a lease or ownership interest in a solar facility are responsible for maintenance of the facility.

> B. Maintenance shall include painting, structural repairs, landscape buffers and vegetation under the around solar panel structures, and integrity of security measures. Access to the facility shall be maintained in a manner acceptable to the Fire Department. The owner, operator or lessee are responsible for the cost of maintaining the facility and any access roads.

Holly Springs will own the land but not the solar facilities equipment installed on the land. (Prot. Ex. 14). Based on the evidence, non-petitioners will either have a lease or ownership interest in the solar facilities. Consequently, this Board's Order will have no force or effect against the lessee (Meade as the assignee) or the owner. The Board finds that, in this regard, the proposed facilities fail to meet BCZR, §502.1G because they are inconsistent with BCZR, §4F-105 and §4F-106.

The Board is equally concerned with the abandonment and removal of the facilities at the end of the lease. Under BCZR, §4F-107, the "owner" or "operator" also have numerous legal obligations in regard to decommissioning and removal of the facilities. The Board views its determination under BCZR, §502.1 and Article 4F as all-encompassing. Mr. Streit admitted that Power Factor has no experience in decommissioning and removal of solar facilities. Indeed, the Office of Planning Comments dated January 10, 2019 specifies that if approved as a special exception, the Site Plan shall be subject to BCZR, §4F-107. (Prot. Ex. 14).

This Board does not have a reasonable level of confidence that the County will be able to enforce BCZR, §4F-107 obligations against Power Factor who is only a maintenance contractor, and depends on the existence and renewal of a contract with a non-petitioner entity or with an unknown entity. Certainly, given that an Order issued by this Board is not enforceable against Onyx or some other unknown entity, the County, in a code enforcement case, will not be in a position to compel Onyx, or a non-petitioner owner of the solar facilities, to decommission or remove the facilities.

Finally, the Board finds that the proposed solar facilities violate the spirit and intent of the BCZR, Article 4F. BCZR, Article 4F was enacted pursuant to the Community Solar Program law found in MD Code Ann., PU, §7-306.2. The Petitioners do not dispute the application of the Community Solar Program law here. Indeed, in Petitioners' Written Memorandum in Lieu of Closing Argument, and in a letter from Counsel for Petitioners to Office of Planning dated February 14, 2019, Petitioners states that: "The subject proposal is pursuant to that program." (See Pet. Closing Memo, p. 4) (Prot. Ex. 6) , p. 2).

On this point, we note that the Community Solar Program law, MD Code Ann., PU, §7-306.2(d)(13) prohibits the construction of solar facilities on contiguous parcels of land as follows:

> (13) Equipment for a community solar energy generating system may not be built on contiguous parcels of land unless the equipment is installed only on building rooftops.

BCZR, §4F-103.B mirrors Subsection (13) of the Community Solar Program law by also exempting rooftop solar facilities.

In our reading of BCZR, Article 4F, the County Council expressly provided for a single solar facility to be located on a parcel which is not next to another solar facility . In support of our interpretation, BCZR, §4F-101.B defines a solar facility as "A facility… on a tract of land." In addition, the following references to a 'single solar facility' appear in Article 4F here:

> §4F-102.A. – "…a solar facility"
> §4F-102.B.1 – "a single solar facility"
> §4F-102.B.3 – "all permits issued for a single solar facility in the County".

In this case, Solar Facility 144/121 is located on two contiguous tracts of land. The Petitioners are requesting two separate solar facilities with separate driveways onto Falls Rd. Each solar facility here is separately fenced in and has its own access driveway. Accordingly, we find that

the proposed solar facilities violate the unambiguous wording of both the Community Solar Program law as well as BCZR, Article 4F.

(3) Inconsistent with Vegetative Retention Provisions (BCZR, §502.1.H) and Detrimental to Environmental and Natural Resources (BCZR, §502.1.I).

With regard to vegetative retention provisions under BCZR, §502.1.H, and impact on the environmental and natural resources under BCZR, §502.1.I, the Board finds that the proposed facilities will be inconsistent with, and detrimental to, each of those factors. We note that the Parcels at issue are not cleared, farmland. Rather, each has abundant natural resources and environmental constraints as revealed by Petitioners' photos. (Pet. Ex. 8.A-8.U; 16). The Petitioners' Wetlands Delineation Report provides concrete details about wetlands, vegetation, topography, soil type, trees, specimen trees, floodplains and forests inherent in these Parcels. (Pet. Ex. 20).

According to Mr. Leffner, the initial proposed plan provided for one solar facility confined to Parcel 144. Due to the numerous environmental aspects on Parcel 144 alone including the forest buffer areas, wetlands, floodplains, streams, trees, vegetation, and the limits of disturbance ("LOD") impacts, EPS was not in support of the initial proposal. As a result, Mr. Leffner revised the Site Plan to propose the two solar facilities at issue by utilizing Parcels 144 and 121. (Pet. Exs. 3C, 3D, 22C, 22D). In amending the Site Plan, rather than only request one solar facility within the confines of Parcel 144 by using the most efficient solar panels available and reducing the special exception area, the Petitioners desire to maximize their return on investment.

It is a significant concern to this Board that existing trees and vegetation will be removed to make room for the solar facilities in the following areas:

(1) the line of existing trees and vegetation in the center of Solar Facility 144/121;

(2) the line of existing trees and vegetation on the northern end of Solar Facility 144/121;

(3) the line of existing trees and vegetation in the center of Solar Facility 144; and

(4) the line of existing trees and vegetation around the 'S' shaped and 'U' shaped gravel driveways.

We do not agree that the removal of trees and vegetation as listed above, is minimal. In the Board's view, the removal of trees and vegetation is substantial and unnecessary, and directed by the Petitioners' own interests. As Mr. Kulis stated, "if left in their natural state, a forest would grow near the stream." The Site Plan reveals, and this Board so finds, that specimen trees, and the critical root systems of those specimen trees, will be negatively impacted by the construction of solar panels in the area of those root systems. (Pet. Ex. 3C, 3D, 22C, 22D). The access driveway to Solar Facility 144/121 will be constructed through not only the critical root system of a specimen tree, but through two areas of trees and vegetation. Moreover, the ZAC comments dated December 24, 2018 provide useful information to this Board in that a special variance to the Forest Conservation Law must be approved by EPS when critical root zones of specimen trees are impacted. (Prot. Ex. 5). Yet, Mr. Leffner maintained that no special variances would be needed.

Further, it is only because of the Petitioners' desire for two solar facilities rather than one (1), that the UGE is even needed; it is entirely self-imposed. The Board finds the UGE is detrimental to the stream and the existing trees which line the stream. Mr. Leffner was not clear in his testimony as to the depth necessary for drilling the UGE but acknowledged the horizontal distance would be greater than 200 ft. Mr. Streit admitted that it would be more expensive to connect the two solar facilities above-ground.

The Site Plan shows the forest buffer setback for the stream between Parcels 144 and Parcel 121 running along each of the wire fences to be installed around each facility. We find that the

placement of the wire fences along the forest buffer setback shows unnecessary interference by the solar facilities in these environmentally sensitive areas.

We were also alerted to Mr. Kulis' admission on cross examination that while an Alternatives Analysis is legally required under BCC, §33-3-112(c)(1), that provision would be not enforced by EPS based on an unwritten policy, as long as the stream which bisects the solar facilities is not disturbed. While Mr. Kulis stated that this issue would be addressed at the time of the grading permit, we find the stream will be disturbed and EPS should have required an Alternatives Analysis. Mr. Kulis further acknowledged that vegetation will be cleared and soil will be disturbed in the forest buffer when the UGE is drilled in violation of BCC, §33-3-112(b)(2)(ii) and (iii). Thus, while EIR concedes that there will be impacts to the environment in this case and views these as minimal, this Board does not.

In the Board's view, there is an unexplained change in position by EIR where by letter from EIR to the ALJ regarding a ZAC meeting on June 3, 2019, EIR required an alternatives analysis due to the UGE through the Forest Buffer Easement and under the stream. (Prot. Exs. 3A, 3B). In the letter, EIR expressed the need to review and approve an Alternatives Analysis in regard to the LOD. Additionally, the County's Development Plans Review office, in its ZAC Comments dated June 19, 2019 confirmed that solar panels are considered "utilities" which would require an alternatives analysis under BCC, 33-3-112(c)(2)(i). (Pet. Ex.12). We did not find Mr. Leffner's testimony clear in providing the actual level of disturbance within the environmental areas of these parcels. For all of these reasons, we are convinced that an Alternatives Analysis was required in accordance with BCC.

We would add that in reviewing the purpose of solar facilities legislation set forth in BCZR, 4F-101.A, the County Council specified that solar facilities would be permitted if it met the special

exception factors, balancing the benefits of a solar energy against the potential impact on the County's land use policies. Yet, as stated by counsel for the Petitioners in a letter to the Office of Planning dated February 14, 2019, RC8 land use policies favor maintaining and protecting environmental resources such as forests, streams, wetlands, trees, floodplains and forest buffers. (Prot. Ex. 6). Based on the evidence presented, this Board is not able to provide "sufficient safeguards" in an Order to protect the forests, wetlands, streams, forest buffers, specimen trees and other natural resources which exist on Parcels 144 and 121. The Board finds the "potential impact" to the natural resources of Parcels 144 and 121 identified in BCZR, §4F-101.A is significant and as such, there is no amount of landscaping or other safeguard which could be imposed as a condition in order to accomplish the purpose of the solar facilities law in this case.

B. Variance.

Petitioners requested a variance from BCZR, §1A01.3.B.3, if necessary, to permit a solar facility to be as close as 0 feet to an internal lot line. This request is a direct result of the desire to install a second solar facility on Parcel 144/121. Given that this Board has denied the special exception relief requested, we need not address the variance issue. However, we will do so in the event that our decision in regard to the special exception is reversed.

We find it ironic that, in support of its position that Parcels 144 and 121 are unique, Petitioners rely on the environmental factors which they discount as existing and which served as one of the basis for this Board to deny the special exception request. We further find that the Petitioners will not suffer a practical difficulty if the solar facilities are not permitted. Indeed, the evidence did not suggest that the only use of this land was as a solar facility. *McLean v. Soley*, 270 Md. 208 (1973); *Trinity Assembly of God v. People's Counsel*, 407 Md. 53 (2008). The Court of

Special Appeals in *Montgomery County v. Rotwein*, 176 Md. 716, 732-33 (2006) citing *Cromwell*, held that economic loss alone does not satisfy the 'practical difficulties' test:

> Economic loss alone does not necessarily satisfy the 'practical difficulties' test because, as we have previously observed, 'every person requesting a variance can indicate some economic loss.' *Cromwell* at 715.....Indeed, to grant a variance application any time economic loss is asserted, we have warned, 'would make a mockery of the zoning program.

In addition, we find that the proposed plan is entirely self-imposed and therefore does not meet the criteria for a variance. The law is clear that self-inflicted hardship cannot form the basis for a claim of practical difficulty. Speaking for the Court in *Cromwell v Ward,* 102 Md. App. 691, 722 (1995), Judge Cathell noted:

> Were we to hold that self-inflicted hardships in and of themselves justified variances, we would, effectively, not only generate a plethora of such hardships but we would also emasculate zoning ordinances. Zoning would become meaningless. We hold that practical difficulty or unnecessary hardship for zoning variance purposes cannot generally be self-inflicted.

The Petitioners desire for two (2) solar facilities is driven by their economic restrictions as controlled by non-petitioners, and therefore the Site Plan is entirely self-imposed.

C. Limited Exemption, BCC, §32-4-106(a)(1)(vi).

Given our denial of the special exception request, the Board need not address the Petitioners' request for limited exemption as a minor commercial structure. However, in the event that our decision on the special exception is reversed, we find that the solar facilities presented here are not minor commercial structures. This is not a small structure but rather two large elaborately designed facilities which consume the majority of both Parcels. As mentioned, these facilities have two separate access driveways and two fenced in areas connected by an UGE. Given the totality of the facts in this case, we do not find these facilities to be either "minor" or "small".

CONCLUSION

After reviewing all of the testimony and evidence presented, the Board finds that Petition for Special Exception pursuant to BCZR, Article 4F should be denied, that the Petition for Variance should be denied, and that the Application for Limited Exemption should be denied.

ORDER

THEREFORE, IT IS THIS 27th day of April, 2020, by the Board of Appeals of Baltimore County,

ORDERED, that the Protestants' Motion to Dismiss the Petition, be and the same is hereby **DENIED** for the reasons set forth herein, and it is further,

ORDERED, that the Petition for Special Exception for a solar facility pursuant to BCZR, Article 4F as set forth on the Site Plan be, and the same is hereby **DENIED** for the reasons set forth herein, and it is further,

ORDERED that the Petition for Variance be and the same is hereby **DENIED** for the reasons set forth herein, and it is further,

ORDERED that the Application for Limited Exemption under BCC, §32-4-106(a)(1)(vi) be and the same is hereby **DENIED** for the reasons set forth herein.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through 7-210 of the Maryland Rules.

BOARD OF APPEALS OF
BALTIMORE COUNTY

Jason S. Garber, Panel Chair

Maureen E. Murphy

Deborah C. Dopkin

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

April 27, 2020

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

Michael R. McCann, Esquire
Michael R. McCann, P.A.
118 W. Pennsylvania Avenue
Towson, Maryland 21204

RE: In the Matter of: *Holly Springs Nature Conservancy & Wildlife Sanctuary, Inc. – Legal Owner*
Power Factor, LLC – Lessee
Case Nos.: 19-183-X and CBA-20-004

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Duplicate Original Cover Letter

c: See Distribution List Attached

Mary Zodhiates/Holly Springs Nature Conservancy and Wildlife Sanctuary, Inc.
Power Factor, LLC
Valleys Planning Council, Inc.
North County Community Group
Kevin and Maria Webb
Linda Ault
Ethan Lavin
Wayne and Allene Yelle
Mary Ruth Fowble
Glenn and Donna Fowble
Office of People's Counsel
C. Pete Gutwald, Director/Department of Planning
Paul M. Mayhew, Managing Administrative Law Judge
David V. Lykens, Director/DEPS
Michael D. Mallinoff, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
James R. Benjamin, Jr., County Attorney/Office of Law